Supreme Court, U.S.
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No. 85-1205

In the Supreme Court

OF THE

United States

October Term 1985

JEROME B. ROSENTHAL, et al.,
Petitioners,
vs.
DORIS DAY, etc., et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL FOR THE SECOND APPELLATE DISTRICT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Arwin Productions, Inc.
Daywin Music, Inc.
Artists Music, Inc.
Martin Melcher Productions, Inc.
Equinox Records, Inc.

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SUMMARY OF ARGUMENT

The Petition for Certiorari (the "Petition") filed by Petitioner Jerome B. Rosenthal ("Rosenthal") is frivolous. In effect, Rosenthal contends that an issue of significant Constitutional dimensions has been created by the existence of various supposed "errors" in the application of California law by the Los Angeles Superior Court and the California Court of Appeal.[1] It is apparent that no such Constitutional issues are presented by this case.

[1]For some unexplained reason, the cover page of the Petition identifies it as a Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit. This case was never before, or decided by, any federal court. The body of the Petition correctly identifies the court which decided Rosenthal's appeal as the California Court of Appeal for the Second Appellate District.

Even without discussing the dubious merits of Rosenthal's assertions of error, there are three separate and distinct reasons why the Petition should be denied:

1. This Court has no jurisdiction under 28 U.S.C. § 1257 because the Constitutional issues identified by Rosenthal were never asserted before, or decided by, any state court.

2. The Constitutional issues identified by Rosenthal are not presented by this case.

3. The Constitutional issues identified by Rosenthal, even if present, are of insufficient significance to warrant decision by this Court.

These matters will be discussed in order.

ARGUMENT

A. This Court Has No Jurisdiction Under 28 U.S.C. § 1257 Because The Constitutional Issues Identified By Rosenthal Were Never Asserted Before, Or Decided By, Any State Court.

Rosenthal seeks to invoke this Court's jurisdiction under 28 U.S.C. § 1257(3). Petition, p. 2. However, § 1257(3), as applicable to this case, only grants jurisdiction to review state court judgments where a right "is specially set up or claimed under the Constitution. . . ." This requirement is jurisdictional; this Court has consistently stated that it has no jurisdiction to review the judgment of a state court unless the federal question raised by the petitioner has been raised before, and decided by, the state court. See *Tacon v. Arizona,* 410 U.S. 351, 352, 93 S.Ct. 998, 35 L.Ed.2d 346 (1973); *Cardinale v. Louisiana,* 394 U.S. 437, 438, 89 S.Ct. 1161, 22 L.Ed.2d 398 (1969); *Crowell v. Randell,* 10 Pet. 368, 9 L.Ed. 458

(1836). See also, R. Stern & E. Gressman, *Supreme Court Practice* § 3.27, p. 214 (5th Ed. 1978) ["It has long been established that the Supreme Court is vested with no jurisdiction unless a federal question was raised and decided in the state court below."].[2]

While Rosenthal vociferously complained to the California courts of numerous alleged "errors", his arguments were based entirely upon California law. The due process and equal protection arguments now asserted by Rosenthal as the basis for Certiorari were never presented to, or decided by, the California courts.[3] Rosenthal's Petition represents the very first instance in which such issues have ever been presented to any court. Indeed, the lengthy opinion of the California Court of Appeal (attached as Appendix A to the Petition) never even mentions the United States Constitution. Under such circumstances, this Court lacks jurisdiction under 28 U.S.C. § 1257.

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[2]A few decisions have recognized a limited exception to this rule in cases of "plain error". See, *e.g.*, *Vachon v. New Hampshire*, 414 U.S. 478, 94 S.Ct. 664, 38 L.Ed.2d 666 (1974). The present case is obviously not such a case. The alleged "errors" complained of all consist of exercises of discretion by the trial court — exercises of discretion which the Court of Appeal found to be proper under the circumstances.

[3]This fact explains why Rosenthal's Petition simply ignored Rule 21.1(h) of the Rules of this Court, which requires the Petition to state when and where the federal questions sought to be reviewed were presented in the state court proceedings.

B. The Constitutional Issues Identified By Rosenthal Are Not Presented By This Case.

A second independent reason why Certiorari is inappropriate here is that the Constitutional issues raised by Rosenthal are not presented by this case.

The Constitutional issues purportedly presented by Rosenthal's Petition are (1) whether a civil litigant "who has effectively been denied the right to be heard" has been denied due process, and (2) whether a civil litigant who has been "arbitrarily" denied a jury trial has been denied equal protection. It is easy to answer these questions in the affirmative, but such an answer is meaningless; these questions are only presented if Rosenthal's selective characterization of the facts is accepted as true.

Rosenthal's factual characterizations have already been heard by the California Court of Appeal and have been determined to be inaccurate.[4] The factual predicate for Rosenthal's newly discovered Constitutional issues has thus been judicially determined to be erroneous. Indeed, if Rosenthal's factual characterizations had been accepted, the California Court of Appeal, applying Califor-

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[4]A comparison of the "facts" stated in the Petition with the facts as stated in the opinion of the California Court of Appeal (attached as Appendix A to the Petition) demonstrates that Rosenthal and the Court of Appeal have very different perceptions of reality. For example, the Court of Appeal viewed Rosenthal's repeated requests for a continuance, his attempts to obtain extensive eleventh-hour discovery and his belated request for a jury trial (after filing two prior written waivers of jury trial) as calculated ploys intended to obstruct an adjudication on the merits. See pp. 53-73 of Appendix A to the Petition. Similarly obstructive conduct by Rosenthal in other cases has been the subject of judicial comment. See *Dallas Cabana, Inc. v. Collier*, 469 F.2d 606, 609-610 (5th Cir. 1972), *cert. denied* 411 U.S. 932, 93 S.Ct. 1901, 36 L.Ed.2d 392 (1973), and *Doanbuy Lease and Co. v. Melcher*, 83 N.M. 82, 488 P.2d 339 (1971).

nia law, would have reversed the judgment. Unless this Court desires to review the entire record (all 27,000 pages) and make an independent determination of the facts, the Constitutional issues raised by Rosenthal are not presented on this record.

C. The Constitutional Issues Identified by Rosenthal Are Of Insufficient Importance To Warrant Decision By This Court.

Even if the Constitutional issues identified by Rosenthal had been raised in the California courts (which they were not) and even if such issues were presented by the record (which they are not), such issues are of insufficient importance to warrant the issuance of a Writ of Certiorari.

In effect, Rosenthal asks this Court to decide whether "the denial of the right to be heard" and "arbitrary" conduct by a state court constitutes a violation of a civil litigant's rights under the Fourteenth Amendment. This is hardly a burning issue in Constitutional litigation. All courts (state and federal) agree that civil litigants have the right to be heard, and that arbitrary conduct by a court is improper.

Since no court claims the right to be arbitrary or to deprive civil litigants of the right to be heard, what purpose would be accomplished by a decision that such conduct violates due process or equal protection? Courts will continue to eschew conduct which they believe to be arbitrary and the question of whether conduct is arbitrary will, as always, depend upon the facts of a particular case. Thus, a decision by this Court on the issues raised by Rosenthal will have no precedential significance; after such a decision, courts will continue to do precisely what they did before the decision.

Since a decision on the Constitutional issues presented by Rosenthal can have no precedential significance, a decision by this Court in this case will affect only the parties. A decision which will affect only the parties does not present the type of "special and important reason" for the grant of Certiorari contemplated by Rule 17.

CONCLUSION

For each of the foregoing reasons, Respondents respectfully urge this Court to deny Rosenthal's Petition for Certiorari.

Respectfully submitted,

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